Supreme Court of the United States

OCTOBER TERM, 1925

No. 253.

DOROTHY SCOTT, *Petitioner*

vs.

J. A. PAISLEY, MRS. FANNIE PAISLEY, CLAUD BRACKETT AND J. I. LOWRY, SHERIFF, *Respondents.*

WRIT OF ERROR TO REVIEW A JUDGMENT OF THE SUPREME COURT OF GEORGIA.

(158 Georgia 876)

BRIEF IN BEHALF OF DOROTHY SCOTT, PETITIONER.

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STATEMENT OF THE CASE

On the 9th day of January, 1917, Mrs. Fannie Paisley owned a certain tract of land in the City of Atlanta, Georgia. On said date, Mrs. Paisley, to secure the payment of a note executed by her to Miss Pauline Schoenthal for $550, the maturity date of which was the 9th day of January, 1920, conveyed said property by security deed to the said Miss Pauline Schoenthal. Subsequently, on the 30th day of July, 1919, Mrs. Paisley conveyed the same property by warranty deed to H. Calhoun Wilson, who, on October 2nd,

1919, conveyed the same by warranty deed to plaintiff in error, both said conveyances being subject to the loan aforesaid.

Some time prior to the May Term, 1920, of the City Court of Atlanta, Miss Schoenthal, through her attorneys, notified Mrs. Paisley of her intention to bring suit on the note referred to above, returnable to the May Term, 1920, of the City Court of Atlanta, and to ask that the judgment rendered in said case include ten per cent. of principal and accrued interest as attorney's fees. Miss Schoenthal entered suit on said note, returnable to the May Term, 1920, of the City Court of Atlanta, a court of exclusively law jurisdiction, and said suit was served upon Mrs. Paisley, the defendant therein named. On the second day of the said May Term, 1920, of the City Court of Atlanta, Mrs. Paisley having failed to interpose any defense to the said suit, the said case was entered in default. On the same day Miss Schoenthal took a verdict against Mrs. Paisley for the principal and interest due on said note, and for said attorney's fees, and finding in favor of a special lien for said amounts, on the property described in the security deed mentioned above; and judgment was entered in accordance with said verdict. Thereafter, Miss Schoenthal executed to Mrs. Paisley as defendant in fi fa a quit claim deed to said property for the purpose of levy and sale, filed same in the office of the Clerk of the Superior Court of said county, and had same recorded, whereupon James I. Lowry, Sheriff of Fulton County, Georgia, levied the execution issuing upon said judgment upon the property whereon a special lien was declared, as the property of said Mrs. Paisley, and proceeded to advertise the same for sale on the first Tuesday in June, 1920, as the property of said Mrs. Paisley. At the time and place designated in said advertisement, said property was exposed for sale by James I. Lowry, Sheriff, and was bid in by J. A. Paisley, husband

of Mrs. Fannie Paisley. James I. Lowry, Sheriff, executed a sheriff's deed, conveying said property to said J. A. Paisley. J. A. Paisley, on or about August 15th, 1921, undertook to convey said property to Claud Brackett, and said Brackett went into possession of the property and remains in possession of the same. Plaintiff in error was not a party to the proceedings described above, had no notice of said proceedings, and was afforded no opportunity to assert and defend her right to the said property, during the course of said proceeding.

On February 13th, 1923, plaintiff in error filed suit against said J. A. Paisley, Mrs. Fannie Paisley, Claud Brackett and James I. Lowry, Sheriff, alleging the facts above set out, and praying relief against said defendants, who were holding adversely to plaintiff in error. The petition was brought in two counts: the first was based upon the proposition that the proceedings set out, did not under a proper construction of the law of Georgia, divest plaintiff in error of her interest in the land, and that they could not constitutionally deprive her of said interest because they did not accord her due process of law; the second was based upon the proposition that her interest was divested through the operation of section 6037 of the Code, and that said section in providing for the divestiture of plaintiff in error's interest, is repugnant to the Fourteenth Amendment to the Federal Constitution, in that it deprived plaintiff in error of her property without due process of law, and denied her the equal protection of the laws.

The petition as amended was dismissed upon demurrer in the Superior Court, and plaintiff in error took the case by bill of exceptions to the Supreme Court of Georgia, where said dismissal was affirmed, and plaintiff in error's interest in said land held to have been divested, in the following language: "Where property incumbered by a deed to se-

cure a debt, under the provisions of the Civil Code, section 3306, was sold, subject to such security deed, by the grantor to a third person, who paid all of the purchase price except the secured debt which the purchaser assumed and agreed to pay, and took a bond for title from the grantor, and thereafter the grantee in the security deed sued his debtor, the grantor, and obtained a judgment for the amount of the indebtedness so secured, and a special lien upon the property conveyed as security, even though the holder of the bond for title was not made a party to the suit or otherwise notified thereof, the equitable interest of the holder of the bond for title was divested by a sale made in compliance with the terms of section 6037 of the Code, under the fi fa issued on said judgment. Such proceeding did not violate the Fourteenth Amendment to the Constitution of the United States, and the similar provision of our State Constitution, which declares that 'No person shall be deprived of life, liberty or property, without due process of law.' "

ASSIGNMENT OF ERROR

Plaintiff in error submits that the said judgment of the Supreme Court of Georgia was erroneous in the following particulars, to-wit:

1. The Court erred in holding that the provisions of an Act of the General Assembly of Georgia, approved August 27th, 1872, entitled "An act to amend an act entitled an act to provide for the sale of property in this State to secure loans and other debts," as the same were enlarged and amplified by the provisions of the first section of an act of the General Assembly of Georgia, approved December 17th, 1894, entitled "an act to provide for the levy and sale of property where the defendant has an interest therein, but does not hold the legal title"—which said provisions are embodied in, and constitute section 6037 of the Civil Code of Georgia of 1910—and said section 6037 of the Code, are

not in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States, for that the State of Georgia through said provisions of said section, assumes and seeks:

(a) To deprive the plaintiff in error, and other citizens of the United States, of property without due process of law.

(b) To deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Georgia, the equal protection of the laws.

2. The Court erred in not holding that said provisions of said statutes and of said Code section 6037 are in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States on the grounds set out in the preceding assignment of error.

3. The Court erred in holding that plaintiff in error is not, by the provisions of said statutes and by said Code section, deprived of property without due process of law.

4. The Court erred in not holding that plaintiff in error is, by said provisions of said statutes and of said Code section, deprived of property without due process of law.

5. The Court erred in holding that plaintiff in error, in being deprived of her property under said provisions of said statutes and under said Code section, was accorded due process of law.

6. The Court erred in not holding that plaintiff in error in being deprived of her property under said provisions of said statutes and under said Code section, was not accorded due process of law.

7. The Court erred in holding that to divest plaintiff in error of her property by a sale had pursuant to a judgment rendered in a suit to which she was not a party, of which she had no notice, and in the course of which she was afforded no opportunity to defend her rights in said property, as authorized by said provisions of said statutes, and by said Code section, was not to deprive plaintiff in error of her property without due process of law.

8. The Court erred in not holding that to divest plaintiff in error of her property by a sale had pursuant to a judgment rendered in a suit to which she was not a party, of which she had no notice, and in the course of which she was afforded no opportunity to defend her rights in said property, as authorized by said provisions of said statutes and by said Code section, was to deprive plaintiff in error of her property without due process of law.

9. The Court erred in holding that to divest plaintiff in error of her property without any judicial proceedings to which she was a party, as authorized by said provisions of said statutes and by said Code section, was not to deprive plaintiff in error of property without due process of law.

10. The Court erred in not holding that to divest plaintiff in error of her property without any judicial proceedings to which she was a party, as authorized by said provisions of said statutes and by said Code section, was to deprive plaintiff in error of property without due process of law.

11. The Court erred in holding that said provisions of said statutes and said Code section do not deny plaintiff in error the equal protection of the laws.

12. The Court erred in not holding that the said provisions of said statutes and of said Code section, do deny plaintiff in error the equal protection of the laws.

1. The Statute Defining the Substantive Rights under Security Deeds in Georgia, is merely Declaratory of the Common Law.

The security deed statute of Georgia, sections 3306-3310 inclusive, of the Code, provides that whenever any person in this State conveyed any real property by deed to secure any debt, and shall take a bond for title back to said vendee, said conveyance shall pass the title to said property to the vendee till the debt which said conveyance was made to secure shall be fully paid, and shall be held by the courts of this State to be an absolute conveyance with the right reserved by the vendor to have the property re-conveyed to him upon the payment of the debt intended to be secured, and not a mortgage.

This statute is not the source of the right to convey the legal title to property as security for a debt. Said right existed at Common Law. Lackey vs. Bostwick, 54 Ga., 45; West vs. Bennett, 59 Ga., 507. "That Act"—referring to the security deed statute—"was not required for the mere purpose of enabling a debtor to pass the legal title as security." West vs. Bennett, 59 Ga., 509.

Nor are the rights of the parties to such a conveyance different, whether the conveyance be made under or independently of the statute. Compare the decisions in Carswell vs. Hartridge, 55 Ga., 412; Johnson vs. Griffin Bank, 55 Ga., 691; Broach vs. Barfield, 57 Ga., 601; and Allen vs. Frost, 62 Ga., 659—wherein the Court dealt with deeds executed under the statute—with the decisions in Biggers vs. Bird, 55 Ga., 650; West vs. Bennett, 59 Ga., 507; Bras-

well vs. Suber, 61 Ga., 398; and Phinizy vs. Clarke, 62 Ga., 623—wherein the deeds before the Court were without the terms of the statute because the wife had failed to join in their execution, as at that time required.

The statute as it was originally passed has two distinctive features: one that the wife must joint in the execution of the deed, and the other that if the debtor should fail substantially to comply with his contract, he should not thereafter have the right to redeem by payment of the secured debt. Georgia laws 1871-1872, page 44. The latter of these provisions was repealed within less than a year after its passage, and the former in 1884, leaving the statute merely declaring the legal effect of a transaction which had identically the same effect without reference to the statute. Biggers vs. Bird, 55 Ga., 650.

In providing that the rights of the grantor in a security deed should not be adversely affected by liens which might otherwise attach against the property by reason of the title's being in the grantee (Code section 3310) the statute worked no change in the rule of law already existing. Note the language of the Supreme Court in Parrot vs. Baker, 82 Ga., 364, where it is said on page 368: "The rule is that the lien of a judgment against the holder of the legal title binds the owner to the extent of the beneficial interest which such owner has in the property." Freeman on Judgments, paragraphs 356 and 357; Ware vs. Jackson, 19 Ga., 452; Corbally vs. Hughes, 59 Ga., 493. The Court thereupon holds that where a judgment debtor holds the legal title to property as security for a debt, it is immaterial whether his acquisition of title occurred under or independently of the security deed statute, since, in either event, the property is bound by the judgment to the extent of the debtor's beneficial interest therein.

2. Section 6037 is not a Substantive Law, Does not enter into the Contract of the Parties, and Plaintiff in Error is not Estopped to Attack same.

Section 6037 reads as follows: "In cases where a contract to purchase has been made, or bond for title made, or the purchase money has been partly paid, or in cases where a deed to secure a debt has been executed, and the purchase money or secured debt has been reduced to judgment by the payee, assignee or holder of said debt, the holder of the legal title, or if dead, his executor or administrator, shall, without order of any court, make and execute to said defendant in fi. fa., or, if he be dead, to his executor or administrator, a quit claim deed to such real or personal property, and file and have the same recorded in the clerk's office; and thereupon the same may be levied upon and sold as other property of said defendant, and the proceeds shall be applied to the payment of such judgment; or if there be conflicting claims, then the same shall be applied as determined in proceedings had for that purpose.

It is apparent that the section merely provides a remedy, —that it is a purely adjective statute. And a statutory remedy, even though embodied in the same statute which defines the rights to be enforced, does not constitute a part of the contract between the parties unless expressly so provided in the contract, or made exclusive by the statute. Standifer vs Wilson, 93 Tex., 232; Wilson vs Standifer 184 U. S. 399. The remedy provided by section 6037 is not exclusive, since an equitable mortgage foreclosure may be substituted by the creditor; Sloss vs Mutual Building and Loan Association, 97 Ga., 401. or he may recover the property in ejectment and realize his claim out of the rents and profits. Polhill vs Brown, 84 Ga., 338; Gunter vs Smith, 113 Ga., 18; Harris vs Powers, 129 Ga., 82.

"In the proposition often stated in the decisions the parties contract with reference to existing laws, and that such laws become a part of the contract, the reference is to those laws which determine and fix the obligation of the contract, the co-relative rights and duties springing from it, and not to laws of mere procedure prescribing remedies. With reference to these, there is ordinarily no obligation arising, but the contract is made in contemplation of the power of the Legislature to change them." Aikins vs Kingsbury, 151 P., 147; Wilson vs Standifer 184 U. S., 399.

"The distinction between the obligation of a contract, and a remedy given by the Legislature to enforce that obligation, exists, in the nature of things, and without imparing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct." Chief Justice Marshall in Sturges vs Crowninshield, 4 Wheat, 122.

And since section 6037 did not enter into the contract of the parties to the security deed transaction, its mere existence at the time plaintiff in error purchased the property in controversy, created no estoppel against her. If it were otherwise, every remedy existing when a contract is made, however unreasonable, arbitrary or oppressive, and how flagrantly it violates the requirements of notice and a hearing, would constitute due process of law in the enforcement of the contract.

With reference to the question of estoppel, discussed in the paragraph immediately above, see Coe vs. Armour Fertilizer Works 237 U. S. 413. In that case the Florida Supreme Court had held that a stockholder became such charged with notice that under the statute then before the Court an execution might be issued against him for the amount of the unpaid subscription of the capital stock, upon the return of a nulla bona on an execution against the

corporation, and that he was therefore precluded from attacking the statute, but must make his defense, if any, under the provisions of the statute. The United States Supreme Court reversed the Florida Court, sustained Coe's right to attack the statute and declared the statute unconstitutional.

3. The Interest in Property remaining in the grantor after the Execution of a Security Deed under the Law of Georgia, Constitutes Property.

"Our organic law ordains that no person shall be deprived of property without due process of law. No authority need be cited to demonstrate that an equity in encumbred real estate is property, and therefore under the protection of the Constitution." State vs Holtcamp, 151 S. W.. 157. See also Williams vs Foy Mfg., Co., 111 Ga, 857.

The grantor in a security deed has the right to possession of the property conveyed as security, until default in the payment of the secured debt. This has never been questioned, but is so universally recognized as to be treated by the courts as a premise rather than a conclusion. Thus in Braswell vs Suber, 61 Ga., 398, the court in recognizing the right of the grantee to recover the property in ejectment on the title derived from the security deed after the debt is in default, says on page 401: "The debt was unpaid, and if it was not due, or there was some agreement to hinder the change of possession, this was matter of defense."

And after default there is no right in the grantee to oust the grantor without judicial process. Benedict vs Gammon Theological Seminary, 122 Ga., 415.

The grantee in a security deed who recovers the property in ejectment after default in the payment of the debt, is

not entitled to mesne profits except pending the action. Polhill vs Brown, 84 Ga., 338-342.

After recovering the property in ejectment, the grantee must apply rents and profits to the payment of the debt, and when the profits are sufficient to discharge the debt, must re-convey to the grantor. Polhill vs Brown, 84 Ga., 338; Gunter vs Smith, 113 Ga., 18; Harris vs Powers, 129 Ga., 82.

"The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being." Wells vs Savannah, 87 Ga., 399. Where the legal title to property has been conveyed to secure a debt, the law looks not to the holder of the legal title, but to the beneficial owner for the tax levied upon the property. Central of Georgia Railroad Company vs Wright, 124 Ga., 630; Central of Georgia Railway Company vs Wright, 166 Fed. 153. "Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the tax." Wells vs Savannah, 87 Ga., 399.

4. Said Property may be sold, and the Purchaser acquires all the Interest, and is Subrogated to all the Rights of the Grantor.

When land is conveyed under section 3306 et seq. to secure a debt, the interest pertaining to such land which the grantor thereafter possesses until the debt is paid, is the right to redeem. This right to redeem is an equitable estate in the land, and may be sold and conveyed, subject to the paramount right of the original grantee to have all the land appropriated to the payment of his debt. Williams vs Foy Mfg., Co., 111 Ga., 857.

Where the grantor in a security deed to land subsequently sells the timber on the land to a third person, such third person acquires the right to redeem the land for the purpose of having the title to his timber unincumbered. Williams vs Foy Mfg., Co., 111 Ga., 857. Where land is purchased from the executor of the grantor in a security deed, the purchaser has the right to tender the amount of the secured debt, and the creditor cannot refuse the tender on the ground that it is made by such purchaser, instead of by his debtor's executor. Loftis vs Alexander 139 Ga., 346.

Central of Georgia Ry. Co. vs Wright, 166 Fed. 153, was a case in which the Central Railroad and Banking Company had conveyed the legal title to certain stock as security for a debt, under the provisions of section 3306, et seq., of the Code. Subsequently the same company sold the stock, subject to the security deed, and by a succession of conveyances the stock eventually came into the hands of the Central of Georgia Ry. Company. The record disclosed no agreement between the successors in interest to the Central Railroad and Banking Company, and the holder of the legal title. The court in that case held, on page 158: "So far as the records show, the same situation exists as to voting stock, election of officers and control and collection of dividends, that existed between the old Central Railroad and Banking Company and the Central Trust Company; and the status between the complainant company and the Central Trust Corporation, to my mind, is the same as though the stock had been transferred by the present company in the same manner and under the same terms and conditions that it was transferred and pledged by the old Central."

5. Plaintiff in Error was Divested of her property through the Operation of Section 6037, Contrary to Settled Usages and Modes of Procedure, and in Derogation of the Common Law and Equity.

The case of Mattlage vs. Mulherrin, 106 Ga., 834, and the present case, plainly hold that the rights of persons occupying the status of plaintiff in error, are divested by the procedure outlined in section 6037. Mattlage vs Mulherrin is the only case ever decided by the appellate courts of this State, which explains how the procedure operates to divest such interest. The Court in that case holds, (pages 838-839) that the suit required under the foreclosure statute, section 6037, operates as a quasi proceeding in rem to bind the defendant and all other persons claiming under the defendant by conveyance executed subsequent to the record of the security deed.

The proceeding could not, except for the statute, operate as a proceeding quasi in rem. The suit is a plain action at law on a note, the purpose of which is to reduce to judgment a debt. Edenfield vs. Bank of Millen, 7 Ga., App., 645. And it is not necessary that either the suit of the judgment specify a special lien on the property. Coleman vs. Slade, 75 Ga., 61; Gillespie vs. Hunt, 145 Ga., 490.

And operating as a proceeding quasi in rem, the suit and judgment could not, except for the statute, establish a lien upon the property of any person except the parties to the suit, or in any way bind third persons. Actions quasi in rem differ, among other things, from actions which are strictly in rem in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties. Freeman vs. Alderson, 119 U. S., 185-188, see page 187; Stroupper vs. McCauley, 45 Ga., 74; Gassert vs Strong, 98 P., 497, see pages 500 and 501; Dulin vs. McCaw, 39 W. Va., 721, 726; see also Bartero vs. Real Estate Savings Bank, 10 Mo. App., 76-79; Woodruff vs. Taylor, 20 Vt., 65-76.

Mattlage vs. Mulherrin analogizes the operation of section 6037 to the operation of the mortgage foreclosure statute (present Code, section 3276 et seq.). Concerning the actual operation of the latter statute, the Supreme Court of Georgia, says, in Williams vs. Terrell, 54 Ga., 463; "Can it be possible that it was the intent of the law that one not a party should be absolutely bound by a judgment against a third person declaring his land to be subject to the mortgage, fixing the amount of it, declaring it still to be subsisting, etc., and that, too, when at the date of the proceeding, the mortgagor had parted with all his interest?" Then, after reviewing the prior decisions of the Supreme Court, the Court holds that a purchaser subsequent to the mortgage but prior to the institution of foreclosure proceedings, is not bound by the mortgage foreclosure.

A fortiore, the suit could not operate as a proceeding in rem, as distinguished from a proceeding quasi in rem. In Webster vs. Reed, 11 Howard, 459, the Court holds as follows: "No person is required to answer in a suit, on whom process has not been served, or whose property has not been attached. In this case, there was no personal service not attachment or other proceeding against the land until after judgment. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."

Not only would the general law not have required plaintiff in error to make defense in the suit provided by section 6037, but the section itself prohibits her doing so. Loftis vs. Alexander, 137 Ga., 65.

6. Plaintiff in Error was not Properly Privy to Said Judgment.

It is obvious from the decision in Mattlage vs. Mulherrin, referred to above, that purchasers of the equitable interest

in land, subsequent to the execution of a security deed, are, in the proceeding prescribed by section 6037, dealt with as privies to the foreclosure judgment, so as to have their rights divested by a sale thereunder.

It is expressly held, however, in Marshall vs. Charland, 106 Ga., 42, that one who acquires an interest in property covered by a security deed is not privy to a judgment of foreclosure under section 6037, rendered in a suit commenced after his acquisition of title. It will be noted that this case was decided prior to the case of Mattlage vs. Mulherrin, and that it was not overruled.

Such so-called privity does not exist independently of said foreclosure statute. "It is well understood, though not usually stated in express terms, in works upon the subject, that no one is a privy to a judgment, whose succession to the rights of property thereby affected, occurred previously to the institution of the suit." Morris vs. Murphy, 95 Ga., 307-310. "Where the doctrine of lis pendens applies, privies are concluded by a final judgment on the merits in a case pending when they purchased; but there is, perhaps, no instance in the whole law where privies in estate are held affected by the result of litigation in a suit commenced by or against a predecessor in title after he has transmitted all the title he ever had." Rucker vs. Womack, 55 Ga., 399.

And that this rule is not changed in a case where the judgment is rendered in a suit brought to enforce a lien upon property which has been sold subject to the security deed, see Williams vs. Terrell, 54 Ga., 462; Marshall vs. Charland, 106 Ga., 42.

7. The Judicial Proceeding Prescribed by Section 6037, did not Accord Plaintiff in Error Due Process of Law.

(a.) Because she was not a party to same.

It is a fundamental principle of due process of law that the rights of a person may not be affected by judicial proceedings to which he is not a party. 12 Corpus Juris, 1227; Carsten vs. Pilsbury, 158 P., 218; Archuleta vs. Archuleta, 123 P., 821; State vs. Guilbert, 47 N. E, 551.

Plaintiff in error was not a necessary party to the proceeding brought under section 6037 in the present case. Brooks vs. Lowry National Bank, 141 Ga., 293. She was not even a proper party to that proceeding. Loftis vs. Alexander, 137 Ga., 65.

(b). Because she did not have proper Notice of Same.

Notice to one whose rights are to be affected by judicial proceedings, is an essential element of due process of law. Coe vs. Armour Fertilizer Works, 237 U. S., 413; Pennoyer vs. Neff, 95 U. S., 714; Windsor vs. McVeigh, 93 U. S., 274.

And the statute authorizing the proceeding must affirmatively require notice, or it will be unconstitutional. Coe vs. Armour Fertilizer Works, cited above; Stewart vs. Palmer, 74 N. Y., 183.

The statute in question did not require, either expressly or impliedly ,any notice to plaintiff in error of the proceeding through which her property was to be divested. Loftis vs. Alexander, 137 Ga., 65; Brooks vs Lowry National Bank, 141 Ga.; 293; and the present case.

The levy after judgment is not sufficient to meet the requirements of due process of law as to notice. See Pennoyer vs. Neff, 95 U. S., 714, in which it is held that notice to a person whose rights are to be affected by judicial proceedings, is essential to give jurisdiction, and that a levy

upon his property after judgment is not the required notice. See also, Webster vs. Reed, 11 Howard, 459.

(c) Because she had no Opportunity to be Heard in the Course of Same.

To deprive a person of his property by or through judicial proceedings in the course of which he is afforded no opportunity to be heard, constitutes a denial of due process of law. Windsor vs. McVeigh, 93 U. S., 274; Coe vs. Armour Fertilizer Works, 237 U. S., 413.

And the statute authorizing the proceeding must, to be constitutional, provide for such hearing. Stewart vs. Palmer, 74 N. Y., 183; Coe vs. Armour and Company, above cited.

A hearing cannot be dispensed with on the assumption that the party to be affected has no defense to offer, or that if a hearing were allowed, the same result would be reached. Coe vs. Armour Fertilizer Works, supra., Reese vs. Watertown, 19 Wall, 107-123.

Plaintiff in error was not, by the provisions of section 6037, afforded any opportunity for a hearing in the foreclosure proceedings through which she was deprived of her property. Not being a party to the proceedings, nor allowed to intervene therein, (Loftis vs. Alexander, 137 Ga., 65) she could not defend as a party. And for the same reason, motion in arrest of judgment, or to set aside the judgment, was not open to her. Code, section 5957; Merchants Bank vs. Haiman, 62 Ga., 624-628; Jones vs. Smith, 120 Ga., 642. And for the same reason, an affidavit of illegality or motion to quash the execution on the ground that she had not had her day in court, was not available. Code, section 5305 Walker vs. Equitable Mortgage Company, 112 Ga., 645; Artope vs. Barker, 72 Ga., 186; City of Atlanta vs. Seaboard Air Line Ry. Co., 137 Ga., 805.

8. Levy and Sale Prescribed by Section 6037 does not of itself Constitute a Proper Summary Proceeding to Deprive Plaintiff in Error of her Equity.

As has already been set out, the levy prescribed by section 6037 has been held to be based upon the judgment in the foreclosure suit required. Mattlage vs. Mulherrin, 106 Ga., 834. Plaintiff in error could not, therefore, be required to wait until her property was seized for sale, to make her defense. Riverside Cotton Mills vs. Menefee, ~~237~~ 237 U. S., 189.

Had the Supreme Court of Georgia and of the United States not held as above set out, the levy and sale prescribed by section 6037 could not be considered a summary proceeding by which the rights of plaintiff in error were divested.

In the case of Coe vs. Armour Fertilizer Works, 237 U. S., 413, the question whether a levy and sale under a writ of execution, can constitute a valid summary proceeding, is presented and decided in the negative. The Court holds, in that case, that the writ of execution cannot, of itself, be treated as equivalent to a writ of attachment, establishing a lien on the property levied upon, but going no further until the owner has had an opportunity to show cause why that property should not be subjected to the payment of the execution. "Not only is such a purpose wholly unexpressed in the writ itself, buf such is not its normal function or effect; no day in court is named, and there is no provision for notice or monition by service, publication, mailing or otherwise." And there is no distinction between the effect of the execution in that case, and an execution which issues upon a judgment rendered under the provisions of section 6037. See also, Windsor vs. McVeigh, 93 U. S., 274. 23 L. Ed., 914 (see page 916).

It is true that there are instances of summary proceedings wherein, upon a seizure of his property under specially provided process, the owner is required to make his defense to the claim asserted against him before his property is disposed of under such process, or forfeit his right to a hearing. And it is also true that section 5157 et seq., of the Code of Georgia, provide generally that whenever an execution or other process is levied upon property, persons other than the defendant in execution may interpose claims, and thus present to the court the issue whether such property is subject to levy under such execution.

But the Supreme Court of Georgia has held that the claims laws of this State are permissive and cumulative only, that the true owner of property is not bound to interpose a claim when his property is levied upon, and that a mere failure to do so does not bar the true owner from subsequently asserting his right to the property. Bodega vs. Perkerson, 60 Ga., 516; Sears vs. Bagwell, 69 Ga., 429; McLennan vs. Graham, 106 Ga., 211. And it is submitted that such an optional mode of defense, granted as a matter of favor or privilege, is not a substantial substitute for the due process of law which the United States Constitution, 14th Amendment, requires. Coe vs. Armour Fertilizer Works, 237 U. S.. 413.

If the levy and sale prescribed by section 6037 could be treated as a summary proceeding, and the right to claim as furnishing an opportunity for a hearing in said proceeding, the remedy afforded by a statutory claim in Georgia, still does not provide such a hearing as is required as an element of due process of law. "Where a security deed is given to secure a note, and after judgment is obtained on the note, the land re-conveyed, and execution levied thereon, a claim is filed by a third person, proof of possession of the land by the grantor in the security deed at the time of the

execution of such deed is sufficient to make a prima facie case against the claimant, in favor of the plaintiff in fi fa." Ford vs. Nesmith, 117 Ga., 211. The judgment, the rendition of which claimant had no opportunity to contest, is presumed to have properly and correctly adjudicated every other fact necessary to uphold the levy; and it is incumbent upon the claimant to defeat the taking, rather than upon the plaintiff in execution to justify it. Ford vs. Nesmith, 117 Ga., supra. To afford plaintiff in error, and others similarly situated, no other opportunity to be heard, and require her to resort to such a proceeding on pain of losing her rights, would be to convert an estate in possession into a mere cause or right of action. Martin vs. White, 100 P., 293. The right of a person to prosecute a claim to prevent the unlawful sale of his property, cannot be substituted for the hearing required by the constitution as a condition precedent to the taking of such property, for "a person who has the legal right, and is actually or constructively in possession, can never be required to take active steps against opposing claims." Groesbeck vs. Seeley, 13 Mich., 329-342.

Section 5158 of the Code provides that in order to prosecute a statutory claim, the claimant must give bond upon which, it is provided in section 5169, he is subject to a judgment for such damages—not less than ten per cent.—as the jury may assess against him on the trial of the claim case.

Moreover, if the levy and sale provided by section 6037 had been held, or could be held, to operate as a summary proceeding, it would be unconstitutional as set out in Parsons vs. Russell, 11 Mich. 113, which holds that a statute which provides for the seizure and sale of property on a mere assertion of a debt or demand against it, without any proof or affidavit to substantiate the claim, is unconstitutional.

9. Such Taking as is Authorized by Section 6037, cannot be Justified as an Exercise of Police Power.

Although the Georgia Supreme Court did not in this case base its decision upon police power, plaintiff in error offers to show that if such had so based its decision the statute could not thereby be justified.

To justify an interference with private rights, under the police power, it must appear not only that such interference has for its object the public good, as held in Lawton vs. Steele, 152 U. S., 133, but also that the means employed tend to the accomplishment of that object. 12 Corpus Juris, 930; People vs. Weiner, 110 N. E., 870.

No good flows to the public from the provisions of section 6037. On the contrary, great and manifest evil flows from them. They constitute an open invitation to the perpetration of frauds upon true owners of property, in that they enable a creditor to collude with a former owner in effecting a stealthy foreclosure Note the fact that it was the husband of the defendant in foreclosure who purchased the property at foreclosure sale in the present case. Paragraphs 14 and 36 of Plaintiff's amended petition, pages 9 and 12, respectively, of the Transcript of Record.

A judgment may be secured in a section of the state distant from the county in which the land lies, and in which the true owner resides, and the effect of such judgment is not only to authorize a sale of the property to satisfy an alleged obligation, but to increase the burden of that obligation by the addition of a per centage of principal and interest as attorney's fees. Guarantee Bank & Trust Company vs. American National Bank, 15 Ga. App., 778. And all the while, the owner of the property may be in search of an illusive security deed holder. Such action is possible in the face of the fact that under section 4252 of the Code, an

agreement to pay attorney's fees in addition to principal and interest, is unenforcible except in a suit brought on the instrument containing such agreement, after notice to the debtor; see said section; the right to recover attorney's fees at all being based upon the necessity of entering suit ofter such notice.

But, it is respectfully submitted, the extent to which a state may go in curtailing the rights of its citizens generally, is not involved in the present case. The right to notice of, and an opportunity to be heard in, a judicial proceeding through which rights are to be divested or affected, although such proceeding be authorized pursuant to the police power, cannot be taken away. 12 Corpus Juris, 1229; Smith vs. Board of Medical Examiners, 140 Iowa, 66.

"Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to the settled usages and modes of procedure, and without notice or an opportunity for a hearing." Ochoa vs. Hernandez y Morales, 230 U. S., '57 L. Ed., 1429-1436.)

It has been shown that section 6037 as construed by the Supreme Court of Georgia, operates to take from a person occupying the status of plaintiff in error, his property and give it to the purchaser at the sale held pursuant to said section, contrary to the settled usages and modes of procedure, and without notice or an opportunity for a hearing. And a statute which attempts to work such a change of ownership is a glaring violation of the constitution, and cannot be defended as an exercise of the police power. 6 R. C. L., 436; Burdick vs. People, 36 N. E., 948.

Respectfully submitted,

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(21)

IN THE

Supreme Court of the United State

NO. 253

OCTOBER TERM, 1925

DOROTHY SCOTT,
Plaintiff in Error

vs.

J. A. PAISLEY, MRS. FANNIE PAISLEY, CLAUDE BRACKETT, AND J. I. LOWRY, SHERIFF,
Defendants in Error

WRIT OF ERROR TO REVIEW A JUDGMENT OF THE SUPREME COURT OF THE STATE OF GEORGIA
(158 Ga. 876.)

BRIEF FOR DEFENDANTS IN ERROR

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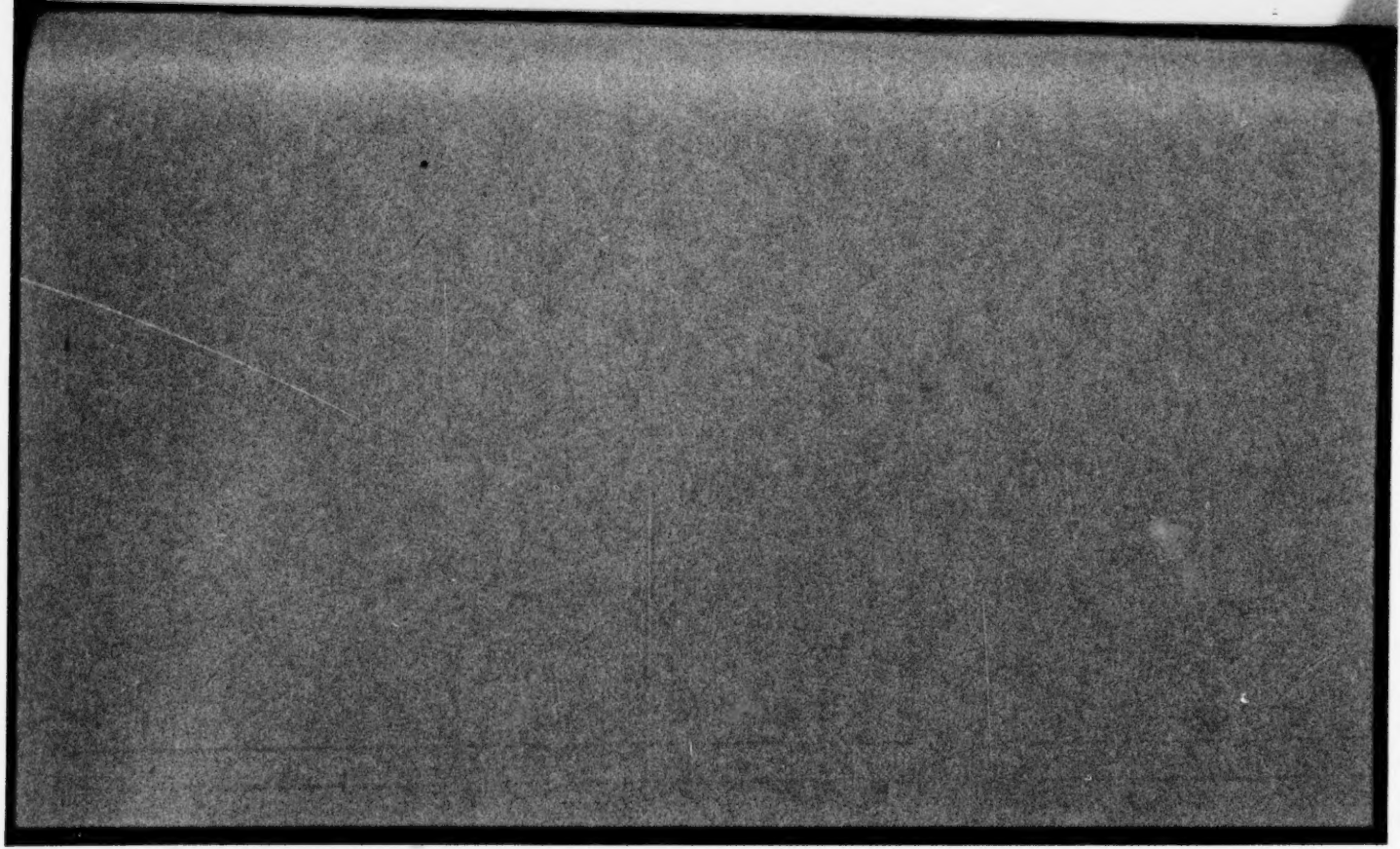

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NO. 253
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WRIT OF ERROR TO REVIEW A JUDGMENT OF THE SUPREME COURT OF GEORGIA (158 GA. 876)

PRELIMINARY PROPOSITIONS

Without regard to the constitutional validity of the Statute raised by the bill of the plaintiff in error, her suit was properly dismissed in the Court of original jurisdiction on general demurrer, for want of equity,

FIRST: Because the action being a suit in equity, it was not maintainable for the reason that the plaintiff had an adequate remedy at law, and was guilty of inexcusable laches in asserting her alleged rights.

SECOND: Because plaintiff was not in position to attack the constitutionality of the Statute called in question, for the reason that her suit failed to show that she had

ever made any offer to redeem the property, the right to redeem which she prayed, or any reason why such offer of redemption had not been made, nor did she in her suit make any tender of redemption or allege a readiness, willingness or ability to redeem.

FOURTH: Because, the plaintiff in error not having come into actual collision with the Statute in question, her suit in the Court of original jurisdiction, was the anticipatory raising of an abstract question of the constitutional validity of a law, and was a moot case in the Court of original jurisdiction, and is a moot question upon her writ of error in this Court, and her writ of error should be here dismissed.

ARGUMENT AND AUTHORITIES ON THE FOREGOING PROPOSITIONS

The suit of plaintiff in error shows that the real estate in question was conveyed to her subject to the loan for the satisfaction of which the property was sold and conveyed by the Sheriff to the predecessor in title of the defendant Brackett, and that she held the property from the 2nd day of October, 1919, the date of the conveyance to her, until the 13th day of February, 1923, the date of the filing of her suit (R. 8, par. 4, 5). It further appears that the property was sold by the Sheriff under execution for the loan, which she had assumed, on the first Tuesday in June, 1920.

Under the laws of Georgia, the plaintiff in error at all times from the time of the conveyance of the property to her and until the sale by the Sheriff, had the right to redeem the property.

In the case of *Loftis vs. Alexander, 139 Ga., 346*, the Supreme Court of Georgia, holds, that—"In this State a deed to secure a debt is not the same as a mortgage. Such a deed

conveys title; a mortgage is only a lien. But a deed of that character is in several particulars similar to a common law mortgage; and one of them is as to the right of one who buys the property from the maker of the deed and obtains an equitable interest therein to protect his purchase by paying off the secured loan, especially where as part of the contract of purchase, he agrees to make such payment."

It is obvious, therefore, that any time prior to the first Tuesday in June, 1920, under the law, as it existed in the State of Georgia, the plaintiff in error could have tendered the amount of the loan with interest and costs accrued and demanded a reconveyance of the property to her, or a satisfaction on the record of the loan deed, which under the law of Georgia would have amounted to a reconveyance (Code of Georgia, (1910) §3309. Printed in the margin).*

Applying the rule that equity aids only the vigilant and not those who slumber on their rights, plaintiff in error had no standing in equity in the Court of original jurisdiction. From the 2nd day of October, 1919, when the property in question was conveyed to the plaintiff in error, by warranty deed, subject to the outstanding loan (R. 8, par. 5), by the very terms of the conveyance to her she had notice of the loan; that the interest was payable semi-annually and that said loan matured on the 9th day of January, 1920 (R. 7, par. 8). After securing a conveyance to herself of the property, she went to sleep and slept on until after the

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*GEORGIA CODE OF 1910 §3309.

In all cases where property is conveyed to secure a debt, the surrender and cancellation of such deed in the same manner that mortgages are now canceled, on payment of such debt to any person legally authorized to receive the same, shall operate to reconvey the title to said property to the grantor, his heirs, executors, administrators, or assigns, and such cancellation may be entered of record by the Clerk of the Superior Court in the same manner that cancellations of mortgages are now entered.

maturity of the note and until after suit was entered on the note to the May Term, 1920, of the City Court of Atlanta (R. 8, par. 8). She slumbered through the default entered in the suit upon the note; through the rendition of a verdict and judgment and the issue of an execution, the levy of an execution, the filing and record in the office of the Clerk of the Superior Court of Fulton County, Georgia, of a quitclaim deed for the purpose of levy and sale; through a levy; through all the time that the property was being advertised by the Sheriff for sale, and on past the sale which was had on the first Tuesday in June, 1920, (R. 8, par. 8, 9, 10, 11, 12, 13) (R. 14), and continued to slumber on for a period of three years after the sale, finally waking up on the 13th day of February, 1923, without performing any act for the redemption of the property, and then merely submitting to the Court, in her suit, an abstract question whether or not she had any right of redemption in the property.

It is equally apparent that after the sale by the Sheriff, if the plaintiff in error desired to redeem and to test the validity of the Statute under which the Sheriff's deed had been made, she could have tendered the amount deemed by her necessary to redeem to the holder of the title under the Sheriff's Deed. If the tender had been accepted, no resort to the courts, either in law or in equity, would have been necessary. If the tender had been refused she could then have made a continuing tender, demanded possession of the premises, upon refusal of possession she could have sued in ejectment for the land, and upon resistance upon the title derived from the Sheriff she could have then raised the question of the validity of the Statute under which the Sheriff's deed was made as a practical question, and not as an abstract proposition, as the same was made in her suit in equity.

Hence, the plaintiff was not only guilty of laches in asserting the right claimed by her but had an adequate rem-

edy at law, and her suit was, consequently dismissed upon general demurrer for want of equity in her petition.

Furthermore, when the suit of the plaintiff in error presented the question of the constitutional validity of the Statutes involved, the court of original jurisdiction was confronted with the decisions of the Supreme Court of Georgia, binding as authority upon it, as to whether the petitioner stood in such relation to the Statutes as to be able by her bill to call in question the constitutional validity of such Statutes. Plaintiff's suit failing to show that she had ever made any offer to redeem the property, the right to redeem which she prayed, or any reason why such offer of redemption had not been made, nor, in her suit, any tender of redemption, or any allegation of a readiness, willingness or ability to redeem, said suit was properly dismissed on demurrer for want of equity.

In the case of *Vestel vs. Edwards, 143 Ga., 368, 372,* the plaintiff attacked a Statute of the State of Georgia as repugnant to the due process of law clause of the State of Georgia and of the United States, and as denying the equal protection of the laws, on account of certain alleged duties and powers conferred upon the State Tax Commissioner, but it appearing from the record that the Tax Commissioner had not exercised the duties imposed upon him so far as the same related to the case at bar, the court held that any discussion or decision of the act relatively to the plaintiff would be moot, adding—"Until that official has exercised the authority conferred upon him by the act to the detriment of the plaintiff, the latter cannot attack the act with respect to the authority thus conferred."

In the case of *Scoville vs. Calhoun, Ordinary, 76 Ga. 263,* it was held—"When a law operates upon the private property of an individual, and it is *seized, destroyed or confiscated, or the individual is indicted for a violation of such law,* he may assail the portion thereof affecting his private property or personal liberty as unconstitutional, and the

courts will make such adjudication as will maintain the integrity of the law as a whole, if possible, and at the same time, protect the citizen against any illegal portions of the law, if there be such." (Italics mine.) This case is cited upon the proposition that the law must actually impinge upon the rights of the person attacking it, before its constitutionality will be passed upon by the Courts.

In the case of *Tolbert vs. Long, 134 Ga., 292,* it was held that where a statute claimed to be unconstitutional was to become operative only after ratified by a popular election, an attack on it would not be sustained prior to the holding of the election, and in the case of *White vs. The City of Atlanta, 134 Ga., 532,* it was held that it was not necessary to pass upon the constitutionality of a Statute until some person affected by the Statute should seek appropriate relief in regard thereto.

The decisions of this court are in accord with the decisions of the Supreme Court of Georgia, that before a person can have relief at the hands of the courts against an unconstitutional law he must have actually suffered, or be actually threatened with an injury to his person or property by the operation of the law, or that the law prevents him from the exercise of some right which he has attempted to exercise.

In the case of *Turpin vs. Lemon, 187 U. S. 51,* it is held that "A plaintiff is bound to show that he has personally suffered an injury by the application of a law before he can institute a bill for relief to test its constitutionality."

In the case of *Williams vs. Hood, 98 U. S., 72,* it is held that "Where a bill shows no equity in the complainant and contains no averment that he has been injured by certain statutes of a State, this court will not pass upon an abstract question the object of which is plainly to obtain a decision touching their constitutionality, but will dismiss the bill without prejudice."

The same principle was applied in the following cases:

Tyler vs. Judges of Court of Registration, 179 U. S. 405;

Clark vs. Kansas City, 176 U. S. 114;

Lampasas vs. Bell, 180 U. S. 276;

Ludeling vs. Chaffee, 143 U. S. 301;

Giles vs. Little, 134 U. S. 645;

Hooker vs. Burr, 194 U. S. 415.

It is the duty of the court to give decisions in actual controversies, and not to give opinion upon moot questions or abstract propositions of law.

American Book Co. vs. Kansas, 193 U. S. 49;

Mills vs. Green, 159 U. S. 651;

Marye vs. Parsons, 114, U. S. 325.

Nor will the Court sustain a writ of error, where it appears that the plaintiff may have a right which he intends to assert but which he has not yet asserted.

Singer Mfg. Company vs. Wright, 141 U. S. 696.

A fair interpretation of the suit of the plaintiff in error is that it invokes a decision of the Court upon an abstract question as to the existence of a right which she has never attempted to exercise and which she is not bound to exercise, and which she might never exercise, if the Court should hold that she has such a right. The question is, therefore, moot, and her writ of error should be dismissed.

NATURE OF THE SECURITY DEED PROVIDED FOR UNDER §3306 AND THE REMEDY PROVIDED FOR UNDER §6037 OF THE CODE OF GEORGIA, (Printed in the margin).*

The deed to secure a debt provided for under §3306 of the Code of Georgia is analogous to and, in legal principle, identical with a trust deed with a power of sale under §6037. The making of a conveyance under §3306 invests the lender with the legal title to the property to be held in trust by the lender as security for the loan secured by the deed, and in trust to reconvey the legal title to the borrower, or to such person as the borrower may have conveyed the property to subject to the outstanding loan deed, upon payment of the loan. The equitable title to the property conveyed, for the want of a better term, usually denominated the "equity of redemption," with the right to occupy the property and enjoy its rents, issues and profits pending default by the borrower and the sale of the conveyed property remains in the borrower.

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*GEORGIA CODE OF 1910 §3306.

Whenever any person in this State conveys any real property by deed to secure any debt to any person loaning or advancing said vendor any money or to secure any other debt, and shall take a bond for titles back to said vendor upon the payment of such debt or debts, or shall in like manner convey any personal property by bill of sale and take an obligation binding the person to whom said property is conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass the title of said property to the vendee till the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the Courts of this State to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and not a mortgage.

A security deed under §3306 of the Code of Georgia, is not a mortgage, but is an absolute conveyance of the legal title.

Code of Georgia, §3306;

Burkhalter vs. Planters Loan & Savings Bank, 100 Ga., 428;

Jewell vs. Walker, 109 Ga., 241;

Shumate, Executor, vs. McLendon, et al 120 Ga., 396;

Woodall vs. Jewell, 140 U. S. 247, 251.

While such a deed is not any where specifically called a trust deed, it is such by its very nature. The author of Perry on Trusts, (Fifth Edition, §150), says, upon the authority of *Morice versus Bishop of Durham, 10 Ves. 537, and Pace vs. Canterbury, 14 Ves. 370,* that—"A very common case of a resulting trust is where the owner of both

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*GEORGIA CODE OF 1910 §6037.

In cases where a contract to purchase has been made, or bond for title made, or the purchase money has been partly paid, or in cases where a deed to secure a debt has been executed, and the purchase money or secured debt has been reduced to judgment by the payee, assignee, or holder of said debt, the holder of the legal title, or, if dead, his executor or administrator, shall, without order of any court, make and execute to said defendant in Fi. Fa., or, if he be dead, to his executor or administrator, a quitclaim conveyance to such real or personal property, and file and have the same recorded in the clerk's office; and thereupon the same may be levied upon and sold as other property of said defendant, and the proceeds shall be applied to the payment of such judgment; or if there be conflicting claims, then the same shall be applied as determined in proceedings had for that purpose.

the legal and equitable estate conveys the legal title only, without conveying the equitable interest."

The remedy provided in §6037 is substantially a mere power of sale under a trust deed to be exercised by the holder of the loan deed in accordance with Statutory conditions of extreme caution thrown around the exercise of the power; that is, before the secured creditor can exercise his power of sale, he must first file a suit upon the note given for the loan in some Court of competent jurisdiction having jurisdiction over the person of the original grantor under the loan deed and, by competent proof, establish the validity of the original conveyance, the amount of the indebtedness owing at the time of the filing of such suit and the existence of a default on the part of the debtor, and claim a special lien upon the land under the original security deed. Having obtained such judgment the holder of the legal title under the security deed, is then authorized to proceed to sell the property for the satisfaction of the debt, but he is required first to file and have recorded a deed to the original grantor against whom judgment has been obtained for the purpose of levy and sale. This deed so recorded is

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*GEORGIA CODE OF 1910 §3307.

Every such deed shall be recorded in the county where the land conveyed lies; every such bill of sale, in the county where the maker resided at the time of its execution, if a resident in this State. If a non-resident, then in the county where the personalty conveyed is. Such deeds or bills of sale not recorded remain valid against the persons executing them, but are postponed to all liens created or obtained, or purchases made, prior to the actual record of the deed or bill of sale. If, however, the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded deed or bill of sale, or if the purchaser has the like notice, then the title conveyed by the older deed or bill of sale shall be held good against them.

constructive notice to the world of the intention of the judgment creditor to have the property sold.*

Having re-invested the original grantor with the legal title for the purpose of levy and sale the judgment creditor is then permitted to have a levy made by the Sheriff of the County where the land lies and a sale of the property made for satisfaction of the secured debt. Instead of being allowed to advertise and conduct this sale in some irregular manner as is usually the case under the stipulations of an ordinary trust deed, this sale can only be made after advertisement by the Sheriff in the public gazette in which all judicial sales by the Sheriff are advertised and the sale is made at the time and place of holding the Sheriff's sale and such sale under such power destroys the so-called equity of redemption of the borrower.

THE MAIN PROPOSITION

The Statute contained in §3306 and §6037 of the Code of Georgia are not repugnant to the due process clause of the Constitution of the United States, nor did they deny to the plaintiff the equal protection of the laws, although the so-called "equity of redemption" claimed by the plaintiff in error was completely extinguished by the Sheriff's Sale.

GENERAL STATUTE FOR RECORDING DEEDS.

*GEORGIA CODE OF 1910 §4198.

Every deed conveying lands shall be recorded in the office of the Clerk of the Superior Court of the County where the land lies. The record may be made at any time, but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first.

ARGUMENT AND AUTHORITIES ON ABOVE PROPOSITION

The law under which the loan deed in question in this case was made and the remedy provided for the holder of the secured debt upon default of the borrower, were in force in their present form when the loan deed was executed and plaintiff in error bought the land subject to all the rights and remedies provided in the then existing law.

Section 3306 of the Code of Georgia, is a codification of an Act of the General Assembly of Georgia, passed at the Session of 1871-2, and approved on December 12th, 1872 (Georgia Laws 1871-2 pp. 44, 45), as amended by an Act approved August 27th, 1872, (Georgia Laws of 1872, p. 47), and as further amended by an Act approved on October 16th, 1885 (Georgia Laws of 1884-85, p. 57). Section 6037 of the Georgia Code, is a codification of an Act approved December 17, 1894 (Georgia Laws of 1894, pp. 100, 101). As those portions of these acts now in force and material to this case are contained in Code Sections 3306 and 6037, it is not deemed necessary to reprint them herein.

It was held by the Court in *Clarke vs. Graham, 6 Wheaton, 577,* that—"A title to lands can only be acquired or lost according to the laws of the State in which they are situated," and in *Brine vs. Insurance Company, 96 U. S., 627,* that—"The laws of the State in which land is situated control exclusively its descent, alienation, and transfer, and the effect and construction of instruments intended to convey it. All such laws in existence when a contract in regard to real estate is made, including the contract or mortgage, enter into and become part of such contract."

Under the rule stated in the case last cited the provisions of §3306 and §6037 of the Code of Georgia were a part of the original contract in the security deed given for the loan as if they had been written into it *in haec verbis.*

While the security deed and the remedy provided for its enforcement under the Sections of the Code involved in this case are peculiar to the State of Georgia, (*Shumate, Admr., vs. McLendon, et al 120 Ga., 396)*, the only feature of the law here attacked is the effect of a sale under the suit without making a junior vendee of the land a party to the so called "foreclosure suit," as such failure may affect the right of redemption of the junior vendee.

The conveyance of property under §3306 and §6037 of the Georgia Code to secure a debt conveys the legal estate to the lender and allows the equitable estate to remain in the borrower as an estate upon condition, the condition being that, the borrower will pay the debt according to the terms of the note and the security deed given therefor. After the making of such security deed the borrower holds the equitable estate subject to this condition, which is in the nature of a covenant running with his estate. When he sells to a junior vendee he can not sell any larger estate than is vested in him. Hence, the conveyance of the equitable estate is the conveyance of an estate upon condition.

All such sales are subject to the outstanding loan deed, and in this case was expressly so made. Upon condition broken, that is, upon default of the borrower, or of the person who has assumed payment of the secured debt, a defeasance of the equitable estate vesting the title to the equitable estate back into the original borrower occurs so that, after judgment upon the debt, when a deed is made to the original grantor in the security deed conveying the legal estate to him for the purpose of levy and sale, both the legal estate and the equitable estate are merged in the original grantor in the security deed, against whom judgment has been rendered, so that the levy of the execution issued upon the judgment for the secured debt falls upon both the legal and equitable estate. Upon default in payment by the original maker of the security deed, or by the junior vendee, and upon judgment obtained against the original maker of the security deed, the equitable estate immedaitely reverts

by operation of law in the judgment debtor as an escrow deed for the purpose of levy and sale. The right of tendering the debt and having the property conveyed to him persists until the sale, although the estate held by him has passed from him and lies in escrow for the benefit of the remedy pursued by the judgment creditor under the terms of the security deed.

NO RIGHT OF REDEMPTION AFTER SALE

In Georgia there is no right of redemption after judicial sale in any case, except in cases of sales for taxes under executions therefor. In Georgia, a mortgagor, even, in an ordinary mortgage can not redeem after a sale has been made under a foreclosure judgment. *Suttles vs. Sewell, 105 Ga., p. 133,* "When a creditor who had taken a deed from his debtor to secure a debt, pursued the Statute, sued his claim to judgment, filed a deed reconveying to his debtor the land in question, had his execution levied thereon and the property was sold at judicial sale to him; after he obtained the sheriff's deed his title, legal and equitable, become complete and indefeasible." *Crawford, et al vs. Pritchard, et al 81 Ga., p. 14.*

In the case of *Bell Mining Company vs. Butte Bank, 156, U. S., 470,* the Court held,—"That the power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and if he does not choose to foreclose the mortgage by the ordinary methods provided by law, he can proceed under the power added to the sale of the property, to obtain payment of the indebtedness.

"The insertion of a power of sale does not affect the mortgagor's right to redeem so long as the power remains unexecuted, and the mortgage is not, as it may be, foreclosed

in the ordinary manner, but when a sale is made of the interest of the mortgagor his right is wholly divested, embracing his equity of redemption."

In the case of *Carrington vs. Citizens Bank of Waynesboro, 144 Ga., page 52,* it was held,—"After the property had been sold at the second sale and purchased by the grantee in the security deed, under permission contained in the deed to become a purchaser at the sale, the bidder at the first sale had no right, on tender of his bid several days thereafter, to demand its acceptance, and a conveyance of the land to him by the purchaser at the second sale, who was the grantee in the security deed.

"A sale under power in a security deed divests the title of the grantor, and he has no legal right several days thereafter, on tender of the amount of the debt secured by the deed to the grantee, who is the purchaser at the sale, to demand a conveyance of the land or a cancellation of the security deed."

"Where a sale of land is made under a power contained in a security deed, and by permission of the grantor contained in the deed the grantee purchases the land at such sale, the grantor can not defeat the purchaser's right to have the sale fully consummated, by tender of the amount of his indebtedness to the grantee before the actual execution of the deed pursuant to the terms of the sale."

The author of Jones on Mortgages (Sixth Edition at p. 6, §1047, states that—"The right of redemption is barred by a foreclosure properly made, except when a further right is given by Statute," upon authority of the following cases, to-wit:

Weiner vs. Heintz, 17th Ill., 259;
Willis vs. McIntosh, Ga., Dec., 162;
Stoddard vs. Forbes, 16 Ia., 296;
Evans vs. Kahr, 60th Kan., 719;
Martin vs. Ward, 60th Ark., 510.

It will be seen upon the authority of *Suttles vs. Sewell*, supra, that no statutory right of redemption, after judicial sale under a mortgage foreclosure, exists in Georgia.

Then if the right of redemption is to be determined according to the law of Georgia relating to ordinary mortgage foreclosures, such right of redemption does not exist, and if the point is to be determined upon the theory that the security deed was a trust deed with a power of sale, and that the proceeding bringing the property to sale was an exercise of a power, then the right of redemption is destroyed under the law as decided by this Court in the case of *Bell Mining Co. vs. Butte Bank, supra*, and the cases of *Bank of Gutschlick, 14 Peters, 19, 29*, and *Morsel vs. First National Bank, 91 U. S., 357, 361.*

SECTIONS 3306 AND 6037 OF THE GEORGIA CODE DO NOT DENY TO A JUNIOR VENDEE DUE PROCESS OF LAW, OR DEPRIVE HIM OF EQUAL PROTECTION OF THE LAW, NOTWITHSTANDING THEIR FAILURE TO MAKE HIM A PARTY TO A FORECLOSURE SALE.

Although a junior vendee is not a necessary party to a foreclosure under the Sections above named this does not deprive him of due process of law, because the judgment is not conclusive against him and he can assert any rights which he may have in the Courts of Georgia.

"The statutory foreclosure of a mortgage on realty does not contemplate that a third person may defend, and a junior encumbrancer or subsequent purchaser is not a necessary party to a foreclosure suit."

Roberts vs. Atl. Cemetery Ass'n., 146 Ga., 490, 496;

Brooks vs. Lowry Natl. Bank, 141 Ga., 493.

But "the foreclosure of the mortgage to which the subsequent purchaser is not a party, does not affect the right of such purchaser."

Howard vs. Gresham, 27 Ga., 347;

Williams vs. Terrell, 54 Ga., 462;

Osborne vs. Rice, 107 Ga., 281, 285;

Swift vs. Deerick, 106 Ga., 35;

Hinesley vs. Stewart, 139 Ga., 7.

The rule of law obtaining in Georgia in such cases is thus stated in the case of *Osborne vs. Rice*, supra, "A purchaser prior to statutory foreclosure who is not a party, is not bound by the judgment, and may when the Fi Fa is levied go behind the judgment and set up that the mortgage could not be legally enforced against him." The rule applied by the Courts of Georgia is in exact accord with the rule applied by the Supreme Court of the United States. *Howard vs. Railway Co., 101 U. S., 837; Brewster vs. Wakefield, 22 Howard, 118, 129.*

While the judgment rendered in a case of a "foreclosure" at which proceeding a junior vendee of the land is not a party is not conclusive on such vendee, it is valid as between the holder of the mortgage and the mortgagor, and a purchaser at the foreclosure sale acquires the legal estate of the mortgagor, and where no illegality exists in the foreclosure proceedings, the sheriff's deed is superior to the deed executed by the mortgagor after the date of the mortgage.

Roberts vs. Atlanta Cemetery Assn., et al, 146 Ga., 490, 496.

While the foreclosure of the mortgage in which a subsequent purchaser is not a party does not affect the right of such purchaser, his remedy is not the right to redeem after

the sale by tender of the debt secured by the mortgage or security deed in the absence of some valid attack upon the judgment of foreclosure in which some illegality must be shown in the proceedings by which the judgment of foreclosure was rendered. In other words, the person attacking the judgment must set up some reason which he could have urged at the trial under which the judgment was rendered legally sufficient to have prevented the rendition of such judgment if he had been a party to the proceedings.

If such legally defensive facts existed and he was not a party to the foreclosure proceedings, he can, upon the tender of the mortgage debt and the filing of a bill to cancel the mortgage, or in the case of an attempted eviction under the Sheriff's deed, if he was in possession, or in support of an action to recover the land, or in any other proceeding affecting his interest in the land, show that the mortgage was barred by the Statutes of Limitation at the time of the foreclosure suit was filed, (*Williams & Company vs. Terrell, 54 Ga., 462*), or he may go behind the judgment rendered in favor of the plaintiff and show that the debt for the purchase price had been discharged before the suit was begun (*Washington Exchange Bank vs. Holland, 121 Ga., 305-7*), or he may show that the original mortgage or security deed was void for uncertainty (*Osborne vs. Rice, 107 Ga., p. 281*).

It will be seen from these citations that while the law of Georgia cuts off the equity of redemption as relating to a junior purchaser of property transferred by security deed, it preserves all of his rights to show that the judgment of foreclosure was not valid, but before redeeming, he must attack the judgment and show it to have been invalid.

A junior vendee under a security deed who was not a party to the foreclosure proceedings, desiring to set up rights under his junior conveyance as against the judgment rendered in the foreclosure suit, is in the position of a party attempting to open a default, and who must set up, in his

motion, matters which would have been good if they had been pleaded before judgment was rendered, and tender payment of the secured debt. *Stanbach vs. Thornton, 106 Ga., 81, 83; Palmer vs. Young, 96 Ga., 246; Mutual Loan Co. vs. Haas, 100 Ga., 111.*

The contention of the plaintiff in error narrows itself down to the proposition that although she had no defense to the foreclosure which she could have pleaded had she been a party to the foreclosure proceeding, and has none now if the case were reopened and she were made a party, still her right of redemption persists for the mere naked reason that she has never been a party to any judicial proceeding of foreclosure. This position is untenable—(a) Because, there was no privity of contract between her and the holder of the security deed; (b) Because, she bought subject to a contract which provided a method of foreclosure without making a junior vendee a party; (c) Because, under the loan deed and under her purchase of the property subject thereto, the burden was upon her to prevent default and keep informed as to any proceeding to foreclose, which she could neglect to do only at her peril; (d) Because, the Statutory method of foreclosure provided that before the property could be levied upon for the satisfaction of the loan, the holder of the security deed was required to file in the office of the Clerk of the Superior Court,—the Registrar of Deeds under the law of Georgia,—a quitclaim deed for levy and sale, the record of which was constructive notice to junior vendees and to all the world of the seizure of the legal and equitable title for a sale to be had which would bar the right of redemption.

While the purchaser of what plaintiff in error denominates the equity in redemption is not technically bound by the suit, judgment and proceedings to sell because he was not a party, he bought knowing that the law did not require, or make provisions for his being made a party, (Georgia Code §6037); that the method of foreclosure was within the competency of the State of Georgia to enact; that

the Section of the Code under which the security deed was made expressly provided a method of foreclosure only by a suit against the original mortgagor, and in his present suit he sets up no facts which he could have pleaded in defense of a foreclosure if he had been a party.

A junior vendee having bought after the execution of a security deed under Georgia Code, §3306 and subject to it, and to the remedy provided in §6037, is in the position of a person who has acquired an interest in a mortgagee's property after the commencement of suit to foreclose and is represented by mortgagor. *Hollins vs. Brierfield Coal & Iron Co., 150 U. S. 371, 286;*

Whether the junior vendee is bound by the judgment or not, he can not redeem without showing that the Statute was not observed in the proceeding to sell and merely because he was not a party. His case is exactly like that of a purchaser of land from one against whom there is an ordinary common law judgment. Such purchaser would not be bound or estopped by the judgment, but if he could not show a failure to comply with the law in the obtaining of the judgment, the sheriff's sale under the judgment, would pass a good title to the purchaser at the sheriff's sale and the Sheriff's Deed would be superior to the deed of the purchaser of the land who purchased it subject to the outstanding common law judgment.

The whole argument on this branch of the case resolves itself to the simple proposition that a proceeding between A and B cannot be a denial of due process of law as to C when the judgment in the proceeding does not conclude the rights of C and where the Courts are open to C to have his rights adjudicated whenever it may be necessary to the assertion or preservation of his right.

ARGUMENT AND AUTHORITIES IN REPLY TO BRIEF FOR PLAINTIFF IN ERROR

The Remedy provided under §6037 of the Georgia Code Is a Substantive Right Under a Deed Given under the Georgia Statute.

The general rule that the right to a particular remedy is not a vested right is subject to the exception of those cases in which the remedy is part of the right itself.

This exception is the controlling principle upon which State laws so affecting the remedy which existed when a contract was made, which by a change of the remedy contracted for, impair or lessen the value of the contract, are held to be void as laws impairing the obligations of the contract. *Planters Bank vs. Sharp, 6 How. 301; Seibert vs. Lewis, 122 U. S., 284.* The obligation of a contract is impaired whenever legislation lessens the efficiency of the means which, at the time of making a contract, the law provided for its enforcement as by postponing or retarding such enforcement. *Louisiana ex rel. Ranger vs. New Orleans, 102 U. S., 203; Louisiana vs. Pittsburg, 105 U. S., 301; Louisiana vs. Jumel, 107 U. S., 750.* As a State can not enact a law acting directly upon the terms of a contract, so it can not pass a law professing only to regulate the remedy when in fact it impairs the obligation of the contract. *Grantly vs. Ewing, 3 How., 707.*

If a State Statute impairs a means provided by law for the enforcement of a contract, at the time of its making, it is unconstitutional and void. *Louisiana ex rel. Nelso vs. St. Martin's Parish, 111 U. S.,* 716. The remedy provided by a State law when the contract is executed can not be impaired by subsequent decisions of Courts any more than by subsequent Statutes. *United States ex rel. Butz vs. Muscatine, Wallace, 575.*

It follows necessarily that if a remedy is so much a part of the contract as that neither the legislative power by subsequent enactments, nor the judicial power by construction, can affect the remedy without impairing the obligation of the contract that such a remedy is a substantive part of the contract. The remedy provided for the holder of a debt secured by a security deed under the Georgia Statute in question is such a substantive portion of the original contract of security.

In *Pritchard vs. Norton, 106 U. S., on page 132, this Court held that* "The principal that what is apparently mere matter of remedy in some circumstances, in others, where it touches the substance of the controversy, becomes matter of right, is familiar in our Constitutional jurisprudence in the application of that provision of the Constitution which prohibits the passing by a State of any law impairing the obligation of contracts. For it has been uniformly held that "any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." *Citing: McCracken vs. Howard, 2nd, Howard, 608, 612.*

"Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against interference. Whether it springs from contract or from the principles of common law, it is not competent for the legislature to take it away."

A familiar example of such void laws are laws either extending or shortening the time for the redemption of lands sold under executions or mortgage foreclosures.

Barnitz vs. Beverly, 163 U. S., 118.

In the case of *Mutual Loan & Bonding Company vs. Haas, et al,* 100 *Ga., p.* 111, *it was* held that—"Where a debtor executed to a creditor a mortgage upon realty to secure a debt and therein gave to the creditor a power of sale to be exercised on default of payment, the sale to be had at public outcry before the Court House door, and after advertisement, such power became a part of the security, and being conferred for the purpose of effectuating the same, was not revocable, either by the mortgagor or by the rendition of a judgment against him in favor of another creditor. Where on default of payment the mortgagee exercised the power by selling the land this was equivalent to a sale under foreclosure of the mortgage by a court of competent jurisdiction, and a bona fide purchaser at the sale obtained title

free from the lien of judgments junior to the mortgage though rendered before the exercise of the power."

No better example of a vested substantial right created by contract can be imagined than the right contracted for in the case that upon default of the borrower the lender shall find the entire estate, legal and equitable, in the hands of the original borrower capable of being subjected to the satisfaction of the debt and sold under the power given under §*6037* of the Georgia Code without subjecting the borrower to the additional expense of searching for junior vendees to whom the property may have been transferred without notice to him, possibly on the very eve of foreclosure, and who may be beyond the jurisdiction of the Court having venue to entertain a suit against the borrower, which junior vendees may in turn have transferred to others, and thus set the lender upon an interminable, and perhaps impossible, pursuit of elusive vendees.

THE TERM "EQUITY OF REDEMPTION" A MISNOMER APPLIED TO A SECURITY DEED GIVEN UNDER THE GEORGIA STATUTES

The term "Equity of Redemption" arose out of the practice of the Courts of Equity under the common law where the law allowed no right of redemption and equity created a right of redemption. The right being one created by equity, it was properly denominated an "equity" of redemption and for the existence and nature of the rights the practice of the Courts of equity are to be looked to. In the case of a security deed made under the Georgia Statutes, the right to redeem is not an equitable right of redemption, but is a "legal right of redemption," and, in determining the existence nature and extent of the right the creative statute alone is to be looked to. Hence, the decisions cited by counsel for plaintiff in error in his brief on the subject of the "equity of redemption" are of little relevancy.

PRIORITY OF JUDGMENT ON SECURED DEBT OVER A TRANSFER OF SO CALLED EQUITY OF REDEMPTION

Upon the rendition of a judgment upon a debt secured by a security deed such judgment is a general, that is a personal judgment, against the defendant from the date of its rendition, and upon the filing of a reconveyance for levy and sale such judgment becomes a special lien upon the land conveyed as security and takes precedence of an older judgment rendered after the conveyance to secure the debt was made.

McAlpin vs. Bailey, 76 Ga., 687,

Henry vs. McAllister, 93 Ga., 667,

Maddox vs. Arthur, 122 Ga., 671.

It is in accordance with long established legal principles that a judgment may take effect as of a date prior to its actual rendition. At common law, all judgments rendered at a term of court took effect as of the first day of the term and any one who purchased from the defendant in execution after the term of court opened, but before the judgment was rendered, took subject to the lien of the judgment. The Georgia Statute has simply adopted this common law principle and has provided that a judgment on a note secured by a loan deed shall take effect, not from the date of its rendition, but from the date the loan deed was recorded. This principle of law protects every one who may undertake to deal with the borrower after the loan deed has been recorded. The record puts him on express notice that should judgment be rendered it will date back to the date of the recording of the security conveyance. Such a judgment is in no sense a lien against the transferee of the so called equity of redemption. It does not bind any of his rights but it does bind the property of the original borrower as of the date the loan deed was recorded. This right of hav-

ing the lien of his judgment date back is an essential part of the lender's security in the same way that a power of sale is a part of the security.

It is not the judgment that divests the statutory right of redemption, that right is not extinguished until the sale is actually consummated and it is extinguished not by the judgment, but by the sale. A sale upon a judgment of this character necessarily cuts out the right of redemption of a junior vendee. Until default in the security debt and until the holder of the security debt has obtained his judgment, and thus obtained a special lien dating back to the date of the record of his security deed he holds the title pledged to him as security immune from judgments rendered against the debtor after the execution of his security deed and against vendees of the borrower acquiring title to the equitable estate after the record of the security deed. After the holder of the security deed has had his special lien so dating back to the record of his security deed, established as a judgment of the court he can then safely transfer the legal title to the maker of the security deed for the purpose of levy and sale, because his prior special lien judgment is superior to intervening judgments or transfers of the title, and when the sale is made it destroys all rights under judgments or transfers made after the record of the security deed in the same way a sale under an older common law judgment destroys the lien of subsequent judgments or transfers.

Even after the sale the right of a junior vendee is not necessarily extinguished because if the property at the sale brings more than the amount of the judgment under which the sale is made, the excess is payable to such junior vendee. In other words, the Statute does not undertake to divest the rights of the junior vendee, but merely to transfer him to the fund produced by the Sheriff's sale. The prior lien on the fund being in the holder of the judgment under the security deed, and if any excess remains the same

is applicable to junior judgments or junior vendees. The principle involved is that of a sale under a senior lien divesting a junior lien or transfer.

CONCLUSION

The method of conveying property as security for a debt, provided in §*3306* of the Code has been the settled public policy of Georgia for more than fifty years. The method of foreclosure has existed for more than a generation. It constitutes a basic law concerning the tenure and alienation of lands in the State of Georgia, which the State had a right to adopt, and for the protection of junior vendees and all other persons interested in lands conveyed and sold under these Sections of the Code the practice in Georgia gives ample opportunity to every person having a right in such lands to have his right adjudicated in the Courts of Georgia. There is, therefore, no denial of due process of law, or any failure to afford an equal protection of the laws.

Respectfully submitted,

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